IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-21

JAMES MANNING AND WALTER HELM,

Petitioners,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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No.

JAMES MANNING AND WALTER HELM,

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UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

James Manning and Walter Helm petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on May 4, 1978.

OPINIONS BELOW

The court of appeals did not render an opinion but entered a Judgment Order (App. 1a-2a) which is not yet reported. The district court rendered an unreported opinion (App. 3a-8a) with respect to the merits of the

convictions, which are not in issue here. Pertinent portions of the transcript of sentencing proceedings are set forth at App. 9a-12a.

JURISDICTION

The judgment of the court of appeals (App. 1a-2a) was entered on May 4, 1978. On June 2, 1978, Mr. Justice Brennan extended the time for filing this petition to and including July 3, 1978. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether petitioners' due process and confrontation rights and their rights under Rule 32(c)(3)(A) of the Federal Rules of Criminal Procedure were violated by sentencing them on the basis of anonymous conclusory assertions about "organized crime" associations in their presentence reports, in the absence of (a) a meaningful opportunity to rebut the assertions, (b) disclosure of the sources of the assertions, (c) any determination that there was good cause for refusing such disclosure, or (d) any corroboration of the assertions by other means.

CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

1. The Fifth and Sixth Amendments to the United States Constitution provide, respectively, as follows in pertinent part:

> "No person * * * shall * * * be deprived of life, liberty, or property, without due process of law * * * *."

> "In all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation [and] to be confronted with the witnesses against him * * * *."

2. Rule 32(c)(3) of the Federal Rules of Criminal Procedure provides as follows in pertinent part:

> "(A) Before imposing sentence the court shall upon request permit the defendant, or his counsel if he is so represented, to read the report of the presentence investigation exclusive of any recommendation as to sentence, but not to the extent that in the opinion of the court the report contains diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons; and the court shall afford the defendant or his counsel an opportunity to comment thereon *and, at the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report.*"

The emphasized language was added by Congress. 89 Stat. 376 (1975).

STATEMENT

Petitioners were convicted on a single count charging them with violation of 18 U.S.C. §1962(c) by "participating in" the "collection of unlawful debts."[1] The evidence supporting the conviction tended to show that petitioners were "associated with" a check-cashing agency through which they collected certain debts unlawful under State law because they arose out of gambling

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[1] 18 U.S.C. §1962(c) provides that

> "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

transactions. Petitioners were acquitted on a second count of conspiracy with the operator of the check-cashing service and others.[2] Each petitioner was sentenced to three years' imprisonment.

This petition involves not the merits of petitioners' convictions but rather the procedures followed at their sentencing (App. 9a-12a, *infra*). As required by Rule 32(c)(3)(A) of the Federal Rules of Criminal Procedure, each petitioner's counsel was permitted, on the morning of the sentencing, to inspect the presentence report prepared by the probation service with respect to his client. Those reports included statements, said to be based upon information received from "confidential informants and * * * police investigation," to the effect that petitioners had "connections with organized crime" (App. 10a, 11a-12a).[3] Counsel for petitioner Manning, who came on for sentencing first, requested the Court to "disregard any information relating to what the probation officer learned from talking to someone who is not here as to Mr. Manning's alleged connections with organized crime"—noting that "it is an impossible situation for us to deny"—and further urged that "if [the Court is] going to consider that, then I think we ought to be given an opportunity to see the people who have made these statements and question them relating to it" (App. 10a-11a). Counsel for petitioner Helm made the same request for "an opportunity for rebuttal," adding a request that "if Your Honor is going to consider that I would ask that

[2]The district court had previously granted a motion for acquittal on three further counts of aiding and abetting the uttering of false checks (Tr. 4-3—4-4).

[3]As Rule 32(c)(3)(D) contemplates, the presentence reports themselves are not in the record.

sentencing of Mr. Helm be continued until we have had an opportunity to inquire into that facet of the accusation" (App. 11a-12a).

The district court denied these requests, stating that "the court is allowed to consider additional matters" (App. 10a). The prosecution was silent on this point and there was no mention of any circumstance that might have made it inappropriate to identify the confidential informant or informants or explore whatever information they had been given. There was no corroboration of the "organized crime" assertions at the sentencing hearing and there was no direct, indirect or implied reference to organized crime in the testimony at the trial itself, which described a neighborhood bookmaking operation and a patron's embezzlement of checks which were then negotiated through the check-cashing agency.

The district court did not articulate the considerations upon which it based petitioners' three-year sentences on the single rather narrow count on which they were convicted.[4]

REASONS FOR GRANTING THE WRIT

This petition raises the important but unsettled question whether—and if so under what circumstances and with what safeguards—a defendant may be sentenced in reliance upon uncorroborated general statements from anonymous sources about "organized crime" associations or similar suggestions of general criminality. The decision below conflicts in principle with a decision rendered by the Court of Appeals for the Second Circuit only three weeks ago and with decisions by the Court of Appeals for the Ninth Circuit.

[4]Neither petitioner had previously been convicted of any crime (App. 11a, 12a, *infra*).

I.

THE CONFLICT AMONG THE CIRCUITS

Like the present case, *United States v. Fatico*, 2 Cir. No. 78-1003 (June 12, 1978), involved use of confidential statements about organized crime associations in connection with sentencing. In response to the Faticos' objections to such general statements in their presentence reports, the government offered to elaborate through an FBI agent's testimony about information he received from "a reliable confidential informant," with corroboration by testimony of two co-conspirators and other evidence; it objected, however, to disclosure of the informant's identity on the ground that "both his life and usefulness as an informant would be jeopardized" (sl. op. 3461). District Judge Weinstein declined to consider the testimony of the FBI agent unless the identity of this informant were disclosed, holding in a lengthy opinion that "[F]or the court, without disclosure, to rely upon such untested evidence in a situation such as the one before us would violate the Fifth Amendment right to Due Process and the Sixth Amendment right of Confrontation. Cross-examination to determine the credibility of information relied upon by the government is not possible if the source is not known." *United States v. Fatico*, 441 F.Supp. 1285, 1289 (E.D.N.Y. 1977).

The court of appeals took a less absolute approach. It held that "the reliability of evidence that is difficult to challenge must be ensured through cross-examination or otherwise, by demanding certain guarantees of reliability," and that "once the defendants challenged the truth of the hearsay statement [in the presentencing report], the district court correctly called for additional corroboration by the government." But it went on to hold that the other evidence of organized crime affiliation proffered by the government would provide sufficient corroboration of the informant's statements and that under all the circumstances the district court had improperly required his identity to be disclosed. (Sl. op. 3469 and 3471 n. 17.)

> "We hold, therefore, that Due Process does not prevent use in sentencing of out-of-court declarations by an unidentified informant where there is good cause for the nondisclosure of his identity and there is sufficient corroboration by other means." Sl. op. 3469-3470.[5]

Petitioners' sentencing did not comport with this principle, for here there was neither a showing of good cause for concealing the informant's identity nor any corroboration of his charge. Indeed, there was not even the elaboration of the informant's statement that the government proffered through the FBI agent in *Fatico*, and which the Second Circuit implicitly found essential at the threshold.

The decision below equally conflicts with the principle followed by the Court of Appeals for the Ninth Circuit in *United States v. Perri*, 513 F.2d 572 (9 Cir. 1975), holding that a sentence was improperly based upon assertions of "organized crime" associations detailed in confidential reports provided to the sentencing judge but not to the defendant. On remand, the district judge was required to "disclose the basis and the nature of the adverse information to which exception was taken or [to] disregard it", 513 F.2d at 575, for absent such disclosure "[t]he burden placed upon the defendant-appellant and his counsel was impermissible," 513 F.2d at 574.

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[5]The court of appeals did not decide the applicability of the Confrontation Clause at sentencing, holding that in any event the same circumstances would excuse strict confrontation.

> "[F]airness to the defendant in this case requires that he be apprised in detail of the nature of the adverse information on which the court relied in passing sentence. Proper steps can be taken to safeguard the identity of the informant, *if that is necessary*." 513 F.2d at 575; emphasis added.

See also *United States v. Weston*, 448 F.2d 626 (9 Cir. 1971); *United States v. Bass*, 535 F.2d 110, 117-121 (D.C. Cir. 1976).[6]

II.

THE QUESTION IS IMPORTANT AND SHOULD BE SETTLED BY THIS COURT

It is, of course, established that a court may rely upon hearsay information in the presentence report relating to

[6]The government argued below that petitioners could not object to the references to organized crime in their presentencing reports because the district court did not expressly state that it was relying upon them (or indeed state any basis for the sentences); the court of appeals did not deal with this argument in its Judgment Order. The Seventh Circuit has properly held in a closely related context that "The vindication of a defendant's right to not be sentenced on the basis of improper factors or erroneous information * * * should not depend on the fortuity of the sentencing judge disclosing, perhaps inadvertently, the factors relied upon in the imposition of sentence. The fairness of the sentencing process is undermined by reliance upon inaccurate information, not by the sentencing judge stating that he relied upon material which proves to be inaccurate." *United States v. Harris*, 558 F.2d 366, 374 (7 Cir. 1977). That court adopted the test previously stated in *McGee v. United States*, 462 F.2d 243, 247 (2 Cir. 1972), that "[i]t was sufficient to show that it was not improbable the trial judge was influenced by improper factors in imposing sentence." 558 F.2d at 375. Here, the sentencing judge responded to petitoner Manning's objection to the "organized crime" charge by stating that "the court is allowed to consider additional matters" (App. 10a, *infra*) and the imposition of sentence followed soon thereafter; under the circumstances, it is "not improbable" that the court relied upon this "additional matter" in imposing three year sentences upon petitioners' narrow convictions on a single count. Compare *United States v. Tucker*, 404 U.S. 443, 447-448.

"any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence * * *." Federal Rule of Criminal Procedure 32(c)(2); 18 U.S.C. § 3577; see *Williams v. New York*, 337 U.S. 241; *United States v. Grayson*, No. 76-1572, sl. op. 7-9 (June 26, 1978). It is, however, equally well established as a general principle that there must be "careful scrutiny of the *judicial process* by which the particular punishment was determined," *Dorszynski v. United States*, 418 U.S. 424, 443, and that the Constitution places some limits upon what can be relied upon by the sentencing judge. *United States v. Tucker*, 404 U.S. 443; *Townsend v. Burke*, 334 U.S. 736; see *Gardner v. Florida*, 430 U.S. 349, 358; Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 Harv. L. Rev. 821 (1968).

More specifically, language recently added by Congress to Rule 32(c)(3)(A) of the Federal Rules of Criminal Procedure, 89 Stat. 376 (1975), requires that "the court shall afford the defendant or his counsel an opportunity * * *, at the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report." The legislative history explains the purpose of and reason for this language:

> "[It] permits a defendant to offer testimony or information to rebut alleged factual inaccuracies in the presentence report. Since the presentence report is to be used by the court in imposing sentence and since the consequence of any significant inaccuracy can be very serious to the defendant, the Committee believes that it is essential that the presentence report be completely accurate in every material respect." H.R. Rep. No. 94-247, 94th Cong., 1st Sess. (1975) at p. 18.

Unlike many of the matters appropriate to a sentencing decision—such as the defendant's personal traits and background (*Williams*) and his "attitudes toward society and prospects for rehabilitation" (*Grayson*, sl. op. 10)—the question whether a defendant has "organized crime" ties is a discrete question of verifiable fact. When such a fact question is in dispute, as it was here,[7] it is susceptible of elucidation through the processes of oral examination and rebuttal contemplated by Rule 32(c)(3)(A). Although the Rule gives the district court discretion in the matter, the legislative history strongly suggests that such procedures should not ordinarily be denied. This reflects the constitutional principle that "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269-70, citing *Greene v. McElroy*, 360 U.S. 474, 496-497.

In the present case, petitioners had no meaningful opportunity to rebut the charge of "organized crime" associations upon which their sentences were apparently based. The presentence reports gave no specifications as to what was meant by "organized crime," with whom petitioners were alleged to have associated or in what unlawful activities they were alleged to have participated (apart from the narrow substantive count of the indictment on which they were convicted). Lacking such specifications and any knowledge of the identity of their accusers or the substance of the accusations, petitioners were totally incapacitated to rebut the conclusory charge. And they were given no time to attempt to prepare a rebuttal to a charge which first became known to them on the day of sentencing. As Mr. Justice Stevens' opinion

[7] In *Williams*, the Court relied upon the fact that the hearsay information in question was not controverted by the defendant. 337 U.S. at 244.

observed in *Gardner v. Florida*, 430 U.S. 349, 359, the confidential information from which that charge was derived "may bear no closer relation to fact than the average rumor or item of gossip" and "[t]he risk that some of the information accepted in confidence may be erroneous, or may be misinterpreted, by the investigator * * * is manifest."

Whether an enhanced deprivation of liberty under these circumstances deprived petitioners of their rights under Rule 32(c)(3)(A) and the Due Process and Confrontation Clauses is an important question that should be answered by this Court. That the question is both important and recurring is evidenced not only by the conflicting decisions referred to in Section I of this petition, but also by such related cases as *United States v. Woody*, 567 F.2d 1353 (5 Cir. 1978); *United States v. Harris*, 558 F.2d 366 (7 Cir. 1977); *United States v. Williams*, 499 F.2d 52 (1 Cir. 1974); and *United States v. Looney*, 501 F.2d 1039 (4 Cir. 1974); see also *Collins v. Buchkoe*, 493 F.2d 343 (6 Cir. 1974).

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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July 3, 1978

APPENDIX

APPENDIX
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-2393

UNITED STATES OF AMERICA

v.

HELM, WALTER,

Appellant

(D.C. Crim. No. 77-202-3, E. D. of Pa.)

No. 77-2417

UNITED STATES OF AMERICA

v.

MANNING, JAMES aka Juicer
James Manning, *Appellant*

(D.C. Crim. No. 77-202-2, E. D. of Pa.)

Submitted Under Third Circuit Rule 12(6)
May 2, 1978
Before SEITZ, *Chief Judge*, VAN DUSEN and
ROSENN, *Circuit Judges.*

JUDGMENT ORDER

After considering the contentions raised by the appellants, to-wit, that: (1) appellants were not "associated with" an enterprise engaged in the interstate commerce within the meaning of 18 U.S.C. §1962(c); (2) the use at sentencing of anonymous "confidential" information contained in the presentence reports denied appellants of due process and of their right to confront their accusers; and (3) the district court at sentencing improperly punished appellants for their alleged failure to cooperate with the Government, in violation of their constitutional right against self-incrimination; it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court,

/s/ Seitz
Chief Judge

Attest:

/s/
Thomas F. Quinn, Clerk

DATED: May 4, 1978

IN THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA — CRIMINAL

v.

JOSEPH McMONAGLE, JR.
aka Joe Mick
JAMES MANNING
aka Juicer
WALTER HELM — No. 77-202

MEMORANDUM AND ORDER

BECHTLE, J. — September 28, 1977

Defendants Joseph McMonagle, Jr. ("McMonagle"), James Manning ("Manning") and Walter Helm ("Helm") were charged in a five-count indictment with violations of 18 U.S.C. §§1962(c) and (d), 18 U.S.C. §495, and 18 U.S.C. §2. On August 12, 1977, all three defendants were convicted by a jury before this Court of violating 18 U.S.C. §1962(c).[1] McMonagle was also convicted by the jury of violating 18 U.S.C. §1962(d).[2] Each of the

[1] 18 U.S.C. §1962(c) reads, in pertinent part:

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through ... collection of unlawful debt.

[2] 18 U.S.C. §1962(d) states as follows:

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

defendants has filed a motion for judgment of acquittal[3] and for a new trial, pursuant to Rules 29(c) and 33 of the Federal Rules of Criminal Procedure, respectively.[4] For the reasons stated below, we will deny all of the motions.

As we recently stated in *United States v. Miah*, 433 F.Supp. 259, 264 (E.D.Pa. 1977):

> In reviewing the denial of a motion for judgment of acquittal, the crucial issue is whether the evidence, when viewed in a light most favorable to the Government, was such that a jury could have found beyond a reasonable doubt that the defendant was guilty as charged. [Citations omitted.]

As applied to this case, the issue is whether, applying the clear language of 18 U.S.C. §1962(c),[5] the Government produced evidence that McMonagle, Helm and Manning: (1) were employed by *or associated* with *any* enterprise engaged in, or the activities of which affect, interstate commerce, *and*; (2) conducted or participated, directly *or* indirectly, in the conduct of such enterprise's affairs

[3]At the close of the Government's case in chief, the defendants each moved for a judgment of acquittal on each of the five counts of the indictment. Fed.R.Crim.P. 29(a). The motion was granted as to each defendant on Counts III, IV and V, which charged them with having aided and abetted unindicted coconspirator Joseph Braun, Sr., with intent to defraud, to utter and publish forged United States Treasury checks, in violation of 18 U.S.C. §495 and 18 U.S.C. §2. The motions were denied with respect to Counts I and II, which charged violations of 18 U.S.C. §§1962(c) and (d). At the close of all the evidence, each defendant again moved for a judgment of acquittal with respect to the remaining counts. These motions were denied, and the case was submitted to the jury. Fed.R.Crim.P. 29(a).

[4]The Court notes that, of the many grounds raised by the defendants in support of their motions, only those raised in support of their respective motions for judgment of acquittal require discussion.

[5]*See* note 1 *supra*.

through collection of unlawful debt. The enterprise that the Government charges the defendants in this case with having been associated is a proprietorship with the duly registered fictitious name of Active Check Cashing ("Active").[6] Active is clearly an enterprise within the meaning of 18 U.S.C. §1962(c). *United States v. Frumento*, 426 F.Supp. 797, 801-803 (E.D.Pa. 1976), *aff'd.*, ___ F.2d ___ (3d Cir. 1977); 18 U.S.C. §1961(4). It is also clear from the evidence presented at trial that the jury could have found that Active was engaged in or that its activities affected interstate commerce. [N.T. 1-22, 2-100, 2-106.] Therefore, the only issue before the Court is whether or not the Government produced sufficient evidence by which a jury could have concluded beyond a reasonable doubt that Helm, Manning and McMonagle were persons employed by or associated with Active and that they participated, directly or indirectly, in the conduct of Active's affairs through collection of unlawful debt.

McMonagle, in his motion for judgment of acquittal, argues that, although the Government produced evidence at trial that he was connected with Active, there was insufficient evidence that he was involved in the collec-

[6]Count I of the indictment, which charges McMonagle, Helm and Manning with having violated 18 U.S.C. §1962(c), tracks the language of the statute as follows:

> 1. From on or about October of 1971, up to and including the date of the filing of this Indictment, in the Eastern District of Pennsylvania and elsewhere, the defendants, JOSEPH MC MONAGLE, JR., aka Joe Mick, JAMES MANNING, aka Juicer, and WALTER HELM, being persons employed by and associated with an enterprise engaged in and the activities of which affected interstate commerce, to wit: Active Check Cashing, 2734 East Allegheny Avenue, Philadelphia, Pennsylvania, unlawfully, wilfully, and knowingly did conduct and participate directly and indirectly in the conduct of such enterprise's affaris [*sic*] through the collection of unlawful debts.

tion of unlawful debt. Helm and Manning argue in their respective motions for judgment of acquittal that the Government failed to introduce sufficient evidence that either defendant was employed by or associated with Active or that either conducted or participated in Active's affairs through collection of unlawful debt.

At the trial before a jury in this case, the Government produced the following evidence: Unindicted coconspirator William Graham ("Graham") embezzled several thousand dollars' worth of checks from his employer, Philco Ford, for the purpose of placing wagers on horses and paying off accrued gambling debts. [N.T. 1-35, 1-37, 1-38.] Graham placed his wagers with unindicted coconspirator Joseph Pyfer ("Pyfer"). [N.T. 2-120, 2-121, 2-130.]

Pyfer relayed the day's wagers to his "house." [N.T. 2-112.] From approximately 1967 to 1971, Pyfer's "house" was comprised of McMonagle and his father, Joseph McMonagle, Sr., who owned Active [N.T. 2-111, 2-112.] In 1971, Joseph McMonagle, Sr., retired and turned Active over to his son, defendant McMonagle. [N.T. 2-99, 2-100, 2-114.] At approximately the same time that defendant McMonagle acquired Active, he introduced Helm and Manning to Pyfer as the new "house." [N.T. 2-115 to 2-117.] In 1972, soon after the new "house" took over, Pyfer arranged a meeting at the Willow Grove, Pennsylvania, plant of Philco Ford between Helm, Manning and Graham to discuss Graham's payment of a substantial unpaid balance or "tab" he had accumulated with the "house." [N.T. 2-128 to 2-130.] At the conclusion of that meeting, Helm and Manning told Pyfer that Graham had said he "would have checks." [N.T. 2-128 to 2-130.]

Pyfer's normal routine in handling the embezzled checks was that, when he received the checks from Graham, he would deliver them to McMonagle at Active. [N.T. 2-120, 2-121, 2-130.] Approximately three days after dropping off the checks, Pyfer would return to Active, where McMonagle would pay him the net cash proceeds from the checks. [N.T. 2-121, 2-122, 2-130 to 2-134.] The amount which Pyfer owed on his "tab" with the "house" was deducted from the proceeds of the check and paid directly to Helm and Manning by McMonagle. [N.T. 2-132 to 2-134.] On occasion, Pyfer would deliver Graham's checks to Helm, and a few days later he would receive the net cash proceeds from McMonagle at Active. [N.T. 2-140.] Of the 43 Philco Ford checks embezzled by Graham, 24 were cashed through Active. [N.T. 1-12; Government's Exhibits G-50 through G-74.]

We hold first that the evidence presented at trial was sufficient for a jury to conclude beyond a reasonable doubt that McMonagle, Helm and Manning were associated with Active. The context of the word "associate" in 18 U.S.C. §1962(c) and the fact that it is not included in the definitional sections of 18 U.S.C. §1961 indicate that the word must be construed according to its plain meaning. Webster's dictionary defines "associate" as: "to join, often in a loose relationship as a partner, fellow worker, colleague, friend, companion or ally . . . to join or connect with one another. . . ." Webster's Third New International Dictionary (1971 ed.). Construing "associate" in the context of this definition, it is evident that the association need not be a formal one. *Cf. United States v. Frumento, supra*, 426 F.Supp. at 801-803. Rather, an element of 18 U.S.C. §1962(c) is satisfied if the evidence shows that the defendants were associated with the enterprise in question by means of an informal

or loose relationship. The evidence in this case is sufficient to support a finding of an association between the defendants and Active. We hold further that the evidence presented at trial was sufficient for a jury to conclude beyond a reasonable doubt that McMonagle, Helm and Manning participated in Active's affairs through the collection of unlawful debt. The evidence was clearly sufficient to demonstrate that McMonagle, Helm and Manning conducted or participated in Active's affairs through the collection of debts incurred on horse wagers, in violation of 18 P.S. §5514 (1973), formerly 18 P.S. §4607 (1939).

The motions of McMonagle, Helm and Manning for judgment of acquittal pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure will, therefore, be denied.

An appropriate Order will be entered.

IN THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL
	:	
vs.	:	
	:	
JAMES MANNING	:	
WALTER HELM	:	No. 77-202

Philadelphia, Pa., October 14, 1977

Before HON. LOUIS C. BECHTLE, J.

SENTENCING

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[2] PRESENT: ROBERT MADDEN, ESQ.
Assistant United States Attorney
for the Government

HOWARD REIF, ESQ.
for James Manning

LOUIS LIPSCHITZ, ESQ.
for Walter Helm

THE COURT: All right, Mr. Reif.

MR. REIF: Yes. If Your Honor please, initially I would like to comment that I have had an opportunity this morning to see the presentence report relating to Mr. Manning and I would like to object to certain portions of that report.

THE COURT: All right.

MR. REIF: Particularly those portions of the report where the probation officer quotes various confidential sources with respect to Mr. Manning's alleged connections with organized crime, et cetera.

It's an impossible situation for a defendant to come into court faced today, being sentenced on a serious charge, to overcome what's in a presentence report when there's actually no corroboration other than innuendo and statements allegedly made by confidential informants and by police investigation.

I respectfully ask the Court to disregard any information relating to what the probation officer learned from [3] talking to someone who is not here as to Mr. Manning's alleged connections with organized crime. If, in fact, he has any, then I think that it is incumbent on whomever suggests that to prove it to the Court's satisfaction.

I point out that at least my recollection of the testimony at the trial did not show any so-called connection with anything.

THE COURT: Well, under the United States Code the court is allowed to consider additional matters other than what is admissible at a trial, other than admissible evidence.

MR. REIF: Yes, sir, but I say it is an impossible situation for us to deny when there's nothing in there other

than a bald statement that he is involved. That's the point that I would like to make, Your Honor, and if, in fact, you are going to consider that, then I think we ought to be given an opportunity to see the people who have made those statements and question them relating to it. However, that's my point with respect to that, sir.

As far as Mr. Manning's background is concerned, I have reviewed that and I am not going to go over it. I'm certain the Court has seen it.

I think the background information reflects that Mr. Manning is 35 years of age, he is married, he has one child, he has consistently or constantly worked during most of his adult life. He has supported his family. He has been [4] apparently a good father and a good provider and a good husband.

He has a series of arrests, Your Honor, with no convictions. Unquestionably most of the arrests have had to do with illegal lottery and gambling. However, he has not been convicted on anything. So I say he comes in here with a clean record.

* * *

[8] THE COURT: All right.

The sentence of the Court on Criminal No. 77-202, United States versus James Manning, is the defendant is committed to the custody of the Attorney General for three years.

Mr. Helm?

* * *

[9] THE COURT: All right, Mr. Lipschitz.

MR. LIPSCHITZ: If Your Honor please, I would like to join in Mr. Reif's request that we be given an opportunity for rebuttal because there's in the presentence

investigation reference to the fact that Mr. Helm was in some way [10] acquainted or associated with persons engaged in organized crime. The name of the individual from whom that information was obtained has not been made available to us and if Your Honor is going to consider that I would ask that sentencing of Mr. Helm be continued until we have had an opportunity to inquire into that facet of the accusation.

THE COURT: Motion denied.

* * *

[15] MR.-LIPSCHITZ: Now, if Your Honor please, on behalf of Mr. Walter Helm I think the record will indicate that he was never convicted of any crime although he had two prior arrests.

* * *

[19] THE COURT: All right.

The sentence of the Court on Criminal No. 77-202, Count 1, is the defendant is sentenced to the custody of the Attorney General for a term of three years.

* * *

No. 78-21

In the Supreme Court of the United States

OCTOBER TERM, 1978

JAMES MANNING AND WALTER HELM, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

PHILIP B. HEYMANN,
Assistant Attorney General,

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. 1a-2a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 1978. On June 2, 1978, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to July 3, 1978, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the district court abused its discretion by sentencing petitioners after

considering all the information in their presentence reports, including statements that petitioners had connections with organized crime.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioners were convicted of participation in an enterprise affecting interstate commerce through the collection of unlawful debts, in violation of 18 U.S.C. 1962(c). Petitioners were sentenced to three years' imprisonment. The court of appeals affirmed (Pet. App. 1a-2a).

1. The sufficiency of the evidence at trial is not disputed. Briefly, it showed that petitioners were bookmakers who were associated with the Active Check Cashing Agency, through which they collected illegal gambling debts from William Graham. Graham, an accountant for Philco-Ford Corporation, had embezzled checks from his employer and had used the checks to place wagers on horses with petitioners and to pay off his accrued gambling debts to them (Pet. App. 6a-7a). Checks totaling $149,238 were cashed through Active and used in this manner.

2. Before sentencing, each petitioner was allowed to see the presentence report prepared by the probation office. The report on petitioner Manning related that, according to informants, petitioners had connections with organized crime. At sentencing, petitioner Manning's counsel asked the court to disregard any information that "the probation office learned from talking to someone who is not here as to Mr. Manning's alleged connections with organized crime" (Pet. App. 10a). He also stated that, if petitioner had any such connections, they should be

proven to the court's satisfaction. The trial judge responded by reminding counsel that, "under the United States Code the court is allowed to consider additional matters other than what is admissible at a trial, other than admissible evidence" (*ibid.*). After hearing further argument from counsel and granting allocution, the court sentenced petitioner Manning to three years' imprisonment (*id.* at 11a-12a).

Counsel for petitioner Helm then said that he joined in the motion for an opportunity to rebut the statement in the presentence report. Although the court denied his request for a continuance of the sentencing (Pet. App. 12a), it allowed petitioner to present five witnesses to testify about his good reputation in the community (S. Tr. 10-15). Following a statement from counsel and allocution, the court also sentenced petitioner Helm to three years' imprisonment.

ARGUMENT

Petitioners were convicted of a crime that subjected them to a maximum penalty of 20 years' imprisonment and a fine of $25,000. They nonetheless contend that their sentences of three years' imprisonment were illegal because the district court refused to disregard the information in the probation report that they had connections with organized crime. This contention was properly rejected by the court of appeals.

It is well settled that a trial judge in the federal system has wide discretion in determining an appropriate sentence within the limits imposed by Congress, that in making that determination he "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come" (*United States* v.

Tucker, 404 U.S. 443, 446), and that a sentence within statutory limits is generally not subject to appellate review. See *United States* v. *Grayson*, No. 76-1572, decided June 26, 1978, slip. op. 9. See also *United States* v. *Tucker*, *supra*, 404 U.S. at 447-448; *Williams* v. *New York*, 337 U.S. 241. These principles are codified by statute, 18 U.S.C. 3577, which provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

The deference given to a trial judge in sentencing reflects the fact that the judge's experience and training are such that he can be trusted to ascribe only minimal weight to conclusory assertions in reports attributed to unidentified sources. It is also based on the recognition that "[p]robation workers making reports of their investigations have not been trained to prosecute but to aid offenders." *Williams* v. *New York*, *supra*, 337 U.S. at 249. Accordingly, this Court has consistently held that reliance upon hearsay in assessing punishment is not *per se* improper. *Williams* v. *Oklahoma*, 358 U.S. 576, 584; *Williams* v. *New York*, *supra*, 337 U.S. at 247. Only if the sentence has been based upon materially false information about a defendant's prior record is the trial judge's exercise of discretion open to attack. *United States* v. *Tucker*, *supra*, 404 U.S. at 447; *Townsend* v. *Burke*, 334 U.S. 736, 741.

In applying these principles and in reconciling *Tucker* and *Williams*, the courts of appeals have held that a defendant is entitled to some protection against the danger of a court's reliance on erroneous hearsay allegations in imposing sentence. Thus, in cases where a

defendant has received the maximum or a particularly harsh sentence not otherwise warranted by the offense, suggesting that the district court may have taken the damaging hearsay information into account, or where the court has explicitly stated that its sentence was bottomed on the hearsay, and the accuracy of that information is contested, the defendant has been permitted an opportunity to rebut the information. See, *e.g.*, *United States* v. *Harris*, 558 F. 2d 366, 371 (C.A.7); *United States* v. *Perri*, 513 F. 2d 572, 573 n. 1 (C.A. 9); *United States* v. *Looney*, 501 F. 2d 1039, 1041 (C.A. 4); *Collins* v. *Buchkoe*, 493 F. 2d 343, 344-345 (C.A. 6); *United States* v. *Espinoza*, 481 F. 2d 553, 554-555 (C.A. 5); *United States* v. *Walker*, 469 F. 2d 1377, 1380 (C.A. 1), certiorari denied, 410 U.S. 989; *McGee* v. *United States*, 462 F. 2d 243, 246 (C.A. 2).

In the instant case, the sentences petitioners received did not remotely approach the maximum permitted by law: instead of a possible 20 years' imprisonment and fine of $25,000, each petitioner was sentenced to three years in prison.[1] These sentences indicate that the trial judge ascribed minimal weight to the contested statements in the presentence reports concerning petitioners' involvement in organized crime, and they thus serve to distinguish this case from *United States* v. *Weston*, 448 F. 2d 626, 630-631 (C.A. 9), certiorari denied, 404 U.S. 1061, and the other decisions cited by petitioners (Pet. 11), in which the defendants received either maximum sentences or

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[1]The evidence at trial justified the sentences. Petitioners were shown to be not simply two individuals acting by themselves in running a small-time gambling operation, but rather entrepreneurs of an extensive and well-organized business that, in collecting the enormous gambling debts owed by Graham, utilized the services of an interstate enterprise to cash a substantial number of stolen corporate checks.

sentences conceded to be well in excess of the normal punishment for the crime involved. Compare *United States* v. *Shelby*, 573 F. 2d 971, 976 (C.A. 7); *United States* v. *Bass*, 535 F. 2d 110 (C.A. D.C.); *United States* v. *Williams*, 499 F. 2d 52, 55n. 4 (C.A. 1); *Fernandez* v. *Meier*, 432 F. 2d 426, 427-428 and n. 2 (C.A. 9). Significantly, the court in its colloquy with counsel at sentencing did not expressly rely on, or even refer to, any item in the presentence report and instead asked counsel several questions about "evidence in the case that was before the jury" (S. Tr. 7).[2] Moreover, the statement in the report that petitioners had connections to organized crime did not imply much beyond what experts have concluded—that most large-city gambling enterprises are controlled by organized crime. See The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Organized Crime*, p. 2 (1967).

The decision below is not inconsistent with Fed. R. Crim. P. 32(c)(3), since that rule grants the district court discretion to limit the introduction of evidence relating to information in the presentence report.[3] It also does not conflict with either *United States* v. *Fatico*, C.A. 2, No. 78-1003, decided June 12, 1978, or *United States* v. *Perri*, *supra*, on which petitioners rely (Pet. 6-7). In *Fatico*, the court held that the Due Process and Confrontation

[2]The trial judge was quite knowledgeable about the facts in the case, since he had been involved in several related cases with different defendants (S. Tr. 5).

[3]Indeed, the trial judge's refusal to permit petitioners to adduce evidence rebutting the "organized crime" assertions in the presentence report, especially when combined with the judge's failure to allude to those assertions during the sentencing hearing, is further proof that he gave little if any weight to that evidence. Petitioners' objections obviously put the judge on notice that they contested the accuracy of that portion of the Report.

Clauses did not prohibit the trial judge's consideration in sentencing of the testimony of an F.B.I. agent that an undisclosed reliable informant and member of an organized crime family had told the agent that the defendants were members of the same family (slip op. 3469-3470). *Perri*, on the other hand, is plainly distinguishable from this case for the reasons noted above, since there the district court denied the defendant access to a confidential report contaning allegations that the defendant was a representative of organized crime and then imposed the maximum sentence, stating explicitly that the sentence was based on the contested allegations in the report.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1978.

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The government's brief in opposition does not disagree that "a defendant is entitled to some protection against the danger of a court's reliance on erroneous hearsay allegations in imposing sentence" (Opp. 4). Nor does it disagree that these petitioners were sentenced following the district court's consideration of conclusory and uncorroborated anonymous charges which petitioners were precluded from probing or rebutting. Thus, the

question in dispute at this point is whether there was any justification for denying these petitioners the protection acknowledged by the government and by the decisions of other courts of appeals cited in the petition.

The government's argument is, in substance, that these petitioners may not complain about the district court's *consideration* of improper material because it is not clear from the record that the court *relied* upon that material in determining the sentence. The government infers that the improper material was given only "minimal weight" from the circumstances that (1) the sentences imposed were under the maximum; and (2) the court did not expressly indicate reliance upon the material (Opp. 5-6). In addition, the government contends – with perfect circularity – that the district court's lack of reliance can be presumed from its refusal to allow the material to be rebutted (*Id.* n.3).

Such an inferential *post hoc* justification contradicts the Seventh Circuit's recent refusal, in *United States v. Harris*, 558 F.2d 366, 274-75 (7 Cir. 1977), to "adopt a rule which will have the natural and probable effects of encouraging trial judges to avoid giving reasons for sentencing decisions and diminishing the individual offender's confidence in the fairness and objectivity of a critical step in the criminal justice process." See also Pet. 8 n.6. Surely here, as at other important stages of the criminal process, there should be a clear cut procedural rule whose applicability can be determined and understood at the time of the sentencing hearing. Compare *McCarthy v. United States*, 394 U.S. 459. As we have shown (Pet. 6-7), the Second Circuit has articulated

such a rule in *United States v. Fatico*, 2 Cir. No. 78-1003 (June 12, 1978), with which the decision below conflicts.[1]

Respectfully submitted,

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[1] The government's effort to distinguish *Fatico* ignores the fact that the court found both good cause for nondisclosure of the informant there and sufficient corroboration of the charge of organized crime connections. In the present case there was neither.